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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

BOB VAN RONKEL, Plaintiff and Appellant, v. DON KIRSHNER et al., Defendants and Respondents.	B147688 (Los Angeles County Super. Ct. No. BC234639)

APPEAL from an order of the Superior Court of Los Angeles County, Edward A. Ferns, Judge. Remanded with directions.

Ronald Richards & Associates, Ronald Richards, Lissete Garcia and E. Christine Hehir for Plaintiff and Appellant.

Proskauer Rose, Bert H. Deixler and Carolyn R. Young for Defendants and Respondents.

INTRODUCTION

Appellant and plaintiff Bob Van Ronkel ("plaintiff" or "Van Ronkel") appeals the trial court's order to stay the action pending litigation in New York pursuant to a contractual forum-selection clause.

During oral argument on appeal, the parties stipulated that (1) Van Ronkel can dismiss defendant and respondent MCY Music World, Inc. ("MCY"), the party to the forum selection clause; and (2) dismissal of MCY nullifies and voids the grounds upon which the trial court granted the stay pending litigation in New York. On this basis, we remand this case to the trial court to vacate the stay. Plaintiff may then seek to dismiss MCY.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Underlying Written Agreements*

a. *The Kirshner Agreement*

Plaintiff Van Ronkel is in the business of finding and brokering individuals and companies in the entertainment industry. On September 17, 1999, Van Ronkel and defendant and respondent Don Kirshner ("Kirshner"), and no other parties, entered into a written Non-Circumvention Agreement (the "Kirshner agreement") pursuant to which plaintiff agreed to introduce Kirshner to plaintiff's contacts, and Kirshner agreed that he and his "associates, servants, partners, agents or employees" would not enter into any agreements with Van Ronkel's contacts without first entering into a fee agreement with Van Ronkel. The Kirshner agreement contained an arbitration provision, which provided that disputes shall be resolved by arbitration in Los Angeles.

b. *The MCY Agreement*

Defendant MCY, headquartered in New York, is a digital entertainment company offering music over the Internet. On October 7, 1999, Van Ronkel executed an agreement with MCY (the "MCY agreement") whereby, in exchange for a 10 percent commission of any deals subsequently executed, Van Ronkel agreed to contact owners of licensed material on behalf of MCY. This agreement contained a forum-selection clause, initialed by plaintiff, which provided: "The parties hereto agree to submit to the exclusive jurisdiction of the federal or state courts located in New York County, New York in any action which may arise out of this agreement and further agree that said courts shall have exclusive jurisdiction over all disputes between [Van Ronkel] and MCY pertaining to this agreement and all matters relating thereto." The MCY agreement also contained an addendum, pursuant to which MCY and Van Ronkel agreed that Kirshner was an exclusive contact of Van Ronkel.

2. *Alleged Conduct Following Execution of the Agreements*

After execution of the Kirshner and MCY agreements, Van Ronkel introduced Kirshner and MCY to one another. Van Ronkel alleges that subsequent to this introduction, Kirshner and MCY formed defendant and respondent MCY/Kirshner Digital Entertainment Corp. ("MCY/Kirshner") without compensating Van Ronkel. Then, in January 2000, MCY/Kirshner entered into a consulting agreement with defendant and respondent Done That, LLC, ("Done That"), whose managing partner was Kirshner. According to the consulting agreement, Done That was to provide Kirshner's services to MCY/Kirshner for compensation. Van Ronkel alleges defendants breached

the Kirshner and MCY agreements and committed fraud by entering into the consulting agreement and forming MCY/Kirshner.

3. *Van Ronkel Files Suit*

On August 4, 2000, Van Ronkel filed suit against Kirshner, Done That, MCY and MCY/Kirshner (collectively "respondents" or "defendants") alleging four causes of action: (1) breach of contract against Kirshner only; (2) third party beneficiary/breach of contract/quantum meruit against all defendants; (3) conspiracy to commit fraud against all defendants; and (4) fraud and deceit against Kirshner and MCY.

On November 27, 2000, pursuant to Code of Civil Procedure sections 410.30 and 418.10, defendants filed a motion to dismiss or stay the action pursuant to the forum-selection clause in the MCY agreement. Alternatively, Kirshner and Done That moved to stay the action and enforce the arbitration provision in the Kirshner agreement.

On December 12, 2000, Van Ronkel filed his opposition to defendants' motion to stay. Van Ronkel asserted that because the Kirshner arbitration agreement is enforceable only against Kirshner and the MCY forum-selection clause is enforceable only against MCY, the trial court should deny defendants' motion in its entirety and "allow this litigation to continue uninterrupted as to avoid any conflicting rulings on common issues of law, and to avoid the wasting of time and resources in having to proceed with separate actions." Van Ronkel asserted that enforcement of the forum-selection clause would be unreasonable because litigation in New York will be so expensive and inconvenient for Van Ronkel that he will be deprived his day in court. Lastly, Van Ronkel claimed the

lawsuit was local, "inherently more suitable to resolution in California[,] than in New York."

On January 16, 2001, pursuant to the forum-selection clause in the MCY agreement, the trial court granted defendants' motion to stay. The trial court then set a six-month status conference to determine why the action should not be dismissed. On January 26, 2001, plaintiff filed a timely notice of appeal.

CONTENTIONS

In his brief on appeal, plaintiff asserted the trial court erred by (1) staying the action on the basis of the forum-selection clause in the MCY agreement, and (2) requiring plaintiff to litigate his claims against all four defendants in New York.

ORAL ARGUMENT ON APPEAL

On January 16, 2002, the parties appeared for oral argument before this court. At that time, Van Ronkel expressed his desire to dismiss MCY in order to proceed against the remaining defendants in California. Defendants had no objection to the dismissal of MCY. In addition, defendants conceded that dismissal of MCY nullifies and voids the basis upon which the trial court granted defendant's motion for stay, because the forum selection clause in the MCY agreement would no longer be at issue.

Thus, based upon the foregoing, we do not reach the issue of whether the trial court abused its discretion by staying the action and enforcing the forum selection clause in the MCY agreement.

DISPOSITION

We remand this case to the trial court to enter an order vacating the stay, which stay was based upon the forum selection clause in the MCY agreement. Following the trial court's entry of an order vacating the stay, plaintiff shall have 30 days to seek to dismiss defendant MCY. Upon plaintiff's dismissal of MCY, the parties may take any further action they deem appropriate. Should plaintiff fail to seek to dismiss defendant MCY within 30 days of the date the trial court enters an order vacating the stay, the trial court may, pursuant to its discretion, reimpose the stay.

Costs on appeal are to be borne equally by the parties.

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KITCHING, J.

We concur:

CROSKEY, Acting P.J.

ALDRICH, J.